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APR 27 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 808

JAY M. BOWLAND, Petitioner

vs.

STATE OF ARKANSAS, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 699

JAY M. ROWLAND ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR RESPONDENT

STATEMENT

On the 12th day of October, 1947, the petitioner was convicted in the Circuit Court of Garland County, Arkansas, on a charge of bribery and was sentenced to pay a fine of $750.00 and to serve one year in the penitentiary. The petitioner appealed the conviction to the Supreme Court of Arkansas where it was affirmed and a Petition for Rehearing denied. A Petition for Writ of Certiorari was filed in the Supreme Court of the United States and denied on February 28, 1949; a Petition for Rehearing in the Supreme Court of the United States was denied on March 28, 1949. The petitioner, when arrested and during the progress of the trial in the lower court, furnished bail bond in the sum of

$3,000.00, and also furnished bail bond to the Clerk of the Supreme Court of Arkansas in the sum of $3,000.00, which bonds have been at all times in full force and effect and the appellant has been free under those bonds.

The petitioner while under the above bonds, filed a Petition for Writ of Habeas Corpus with the United States District Court for the Western District of Arkansas, Hot Springs Division, and was admitted to bail in the sum of $3,000.00 by the Honorable John E. Miller, Judge of said Court on March 29, 1949 (R. 6-7). On September 2, 1949, the United States District Court for the Western District of Arkansas, Judge Harry J. Lemley presiding, entered a judgment denying petitioner's Petition for Writ of Habeas Corpus, holding that on March 29, 1949, petitioner was not in such custody as required by law to give the court jurisdiction of habeas corpus proceedings (R. 24-33).

ARGUMENT

In the original Petition filed March 29, 1949, before the United States District Court for the Western District of Arkansas, Hot Springs Division, the petitioner alleged that he was then actually, unjustly and unlawfully restrained of his liberty. Thereafter, he makes the following allegation, which is by the respondent conceded (R. 2):

> "That your Petitioner has furnished bail bond to the said Garland County, Arkansas, in the sum of Three Thousand ($3,000.00) Dollars, which bail bond is now in effect, and also has furnished bail bond to the Clerk of the Supreme Court of Arkansas in the sum of Three Thousand ($3,000.00) Dollars, which bail bond is now in effect."

It is, therefore, undisputed and undenied and conceded that the petitioner, at the time of the filing of his Petition herein, was not and is not now actually physically restrained of his liberty by the said respondent. The very nature of habeas corpus and the very basis implies the bringing before the Court by the respondent the body of the prisoner in order that the cause of his restraint may be adjudicated. An actual or physical restraint is necessary to warrant interference by habeas corpus. It is accordingly well settled that a person out on bail is not so restrained of his liberty as to be entitled to a Writ of Habeas Corpus. 25 Am. Jur. 158, Sec. 24. The sole function of the writ is to relieve from unlawful imprisonment and it cannot properly be used for any other purpose. 29 C. J. 12, Sec. 5. We find the following quotation in 39 C. J. S. 440, Sec. 9:

> "Persons discharged on bail are not restrained of their liberty so as to be entitled to discharge on habeas corpus."

In the case of *United States, ex rel Walmer* v. *Tittemore*, 61 Fed. (2) 909, the Circuit Court of Appeals of the Seventh Circuit holds:

> "Second. May one who has been arrested pursuant to criminal warrant issued upon the return of Indictment by Federal Grand Jury and who has been released on his given bond for his appearance in the Court wherein the Indictment was returned, if unsuccessfully contesting removal proceedings from one federal district to another obtain his release through a Writ of Habeas Corpus?
>
> "Our answer to both questions must be in the negative. * * * The second question is similarly answered on the authority of *Stallings* v. *Splain*, 253 U. S. 339; 40 S. Ct. Rep. 537; 64 Lad Ed. 940; and Cyc. of Fed. Procedure, Vol. 5. Sec. 1890."

One of the leading cases involving habeas corpus is the case of *Stallings* v. *Splain*, reported in 253 U. S. 339, 40 S. Ct. Rep. 537, 64 Law Ed. 940. Mr. Justice Brandeis, speaking for the Court, said:

> "Stallings' position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that under such circumstances a petitioner is not entitled to be discharged on habeas corpus * * * being no longer under actual restraint within the District of Columbia, he was not entitled to the Writ of Habeas Corpus." *Wales* v. *Whitney*, 114 U. S. 564. 5 S. Ct. Rep. 1050, 29 Law Ed. 277.

Another well considered case is *McNally* v. *Hill*, 293 U. S. 131, 55, S. Ct. Rep. 24. Mr. Justice Stone, speaking for the Court, said:

> "The purpose of the proceeding defined by the statute was to inquire into the regularity of the detention and the only judicial relief authorized was the discharge of the prisoner or his admission to bail and that only if the detention were found to be unlawful."

The Circuit Court of Appeals for the Third Circuit in the case of *United States, ex rel Potts* v. *Rabb*, 141 Fed. 2d 45, reviews the Writ of Habeas Corpus in the following language:

> "The appellant in effect argues that because there was a short period of time following his arrest on the afternoon of November 15, 1943, in which he was in the custody of the United States Marshal, he is entitled to prosecute this appeal, despite the fact that he was admitted to bail a little later upon the afternoon of that day. We cannot agree. * * * Indeed, if we were to reverse the order of the court below and direct it to grant the writ, our mandate would be a nullity for the appellant is not presently deprived or restrained of his liberty."

Petition for Writ of Certiorari in the Supreme Court of the United States was denied in this case. 322 U. S. 727.

The definition of "restrained" or "imprisonment" is set out in *United States, ex rel Carpa* v. *Curran*, 297 Fed. 946. Judge Rogers, speaking for the Court, said:

> "The term 'imprisonment' imports any restraints placed upon one contrary to his wishes and amounting to a physical detention of his person."

Justice Lamar in the well considered case of *John A. Johnson* v. *Luman T. Hoy*, 227 U. S. 245, 33 S. Ct. Rep. 241, says:

> "* * * since the appeal he has given bond in the District Court and has been released from arrest under the Warrant issued on the Indictment. He is no longer in the custody of the Marshal to whom the writ is addressed and from whose custody he seeks to be discharged."

In the case of *Ex parte Dierks*, 55 Fed. 2d 371, the Court, announcing the rule, says:

> "Habeas Corpus is directed to a person detaining another, commanding him to produce the body of the prisoner and to submit to whatever the Court or Judge issuing the writ shall consider in that behalf."

In the case of *Doss* v. *Lindsley*, 53 Fed. Supp. 427, Judge Lindley again reviews the rule, as follows:

> "The purpose of the proceedings defined by the statute was to inquire into the legality of the detention and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. *McNally* v. *Hill, Warden*, 293 U. S. 131, 55 S. Ct. Rep. 24, 79 Law Ed. 238. Thus, the Supreme Court has said: 'Its purpose is to enable the Court to inquire first if the petitioner is restrained of his liberty. If he is not, the Court can do nothing but discharge the writ.' * * * In *McNally* v. *Hill, Warden*, 293 U. S. 131, at page 138, 55 S. Ct. 24, at page 27, 79 Law Ed. 238, the Court said: 'Without restraint of liberty, the writ will not issue.' *Walls* v. *Whitney*, 114 U. S. 564, 5 S. Ct. Rep. 1050, 29 Law Ed. 277; and *Stallings* v. *Splain*, 253 U. S. 339, 343, 40 S. Ct. 537, 64 Law Ed. 940. Equally without restraint, which is unlawful, the writ may not be used. *A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.*"

The excellent case of *Wales* v. *Whitney*, 114 U. S. 1050, holds:

> "Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it." (Page 1053).

The District Court of the United States for the Middle District of Pennsylvania in *Veach* v. *Smith*, 42 Fed. Supp. 161, adheres to the rule:

> "Petitioner having given bond and having been released from arrest, he is no longer entitled to the benefit of the Writ of Habeas Corpus. He is no longer in the custody of the persons to whom the writ is addressed and from whose custody he seeks to be discharged."

CONCLUSION

We therefore respectfully submit that the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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